

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   FEDERAL COMMUNICATIONS                   :

4   COMMISSION, ET AL.,                   :

5                   Petitioners                   :

6                   v.                   :   No. 10-1293

7   FOX TELEVISION STATIONS,                   :

8   INC., ET AL.                   :

9   - - - - - x

10   Washington, D.C.

11   Tuesday, January 10, 2012

12

13                   The above-entitled matter came on for oral  
14 argument before the Supreme Court of the United States  
15 at 11:22 a.m.

16 APPEARANCES:

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19 behalf of Petitioners.

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21 Respondents Fox Television Stations, Inc., et al.

22 SETH P. WAXMAN, ESQ., Washington, D.C.; on behalf of  
23 Respondents ABC, Inc., et al.

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P R O C E E D I N G S

(11:22 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 10-1293, Federal Communications Commission v. Fox Television Stations.

General Verrilli.

ORAL ARGUMENT OF DONALD B. VERRILLI, JR.,  
ON BEHALF OF THE PETITIONERS

GENERAL VERRILLI: Mr. Chief Justice, and may it please the Court:

In its previous decision in this case, the Court observed that when a broadcast licensee takes a license for the free and exclusive use of a valuable part of the public domain, it also accepts enforceable public obligations. One of those enforceable obligations is the indecency restriction which Congress has instructed the Federal Communications Commission to enforce between the hours of 6:00 a.m. and 10:00 p.m.

Respondents in this case have for years benefited enormously from their free and exclusive use of public spectrum. They argue, however, that neither Congress nor the commission may as a condition of their licenses require that they refrain from broadcasting indecent material when children are most likely to be in the audience.

1 JUSTICE KAGAN: But, General Verrilli, it  
2 seems to me that this contract notion of yours can only  
3 go so far. I mean, if the idea is just, we gave them  
4 something, now they have to do whatever we say, you  
5 wouldn't accept that. So the question is why is this  
6 condition appropriate when many other conditions would  
7 not be appropriate? I mean, tell me if I'm wrong, if  
8 you would say all conditions are appropriate. But I --  
9 I frankly think you wouldn't.

10 GENERAL VERRILLI: This condition is  
11 appropriate, Justice Kagan, because it has been a  
12 defining feature of the broadcast medium from its  
13 inception in the 1920s in the Radio Act and has  
14 continued to be a defining feature of this medium  
15 throughout its history. And the argument that my  
16 friends on the other side are making here is that that  
17 norm, that legally enforceable norm which has been  
18 recognized by this Court in *Pacifica* and has been  
19 applied since the inception of this medium, needs to be  
20 overturned now because circumstances have changed.

21 And I would point out first, if I may --

22 JUSTICE SCALIA: That's one of their  
23 arguments. I mean, another one is that you haven't  
24 defined it precisely enough, right?

25 GENERAL VERRILLI: Yes, that's true.

1 JUSTICE SCALIA: That's a separate, really a  
2 separate argument.

3 GENERAL VERRILLI: That's certainly true,  
4 Justice Scalia, and I will certainly get to vagueness,  
5 if I -- if I may continue along this line.

6 Their argument is that circumstances have  
7 fundamentally changed. I want to point out at the  
8 outset something I think is significant, which is that  
9 their argument would sweep away indecency restriction  
10 with respect to radio as well as television, and they  
11 would sweep that away in the arguments they are making  
12 today without making any showing that circumstances have  
13 changed at all with respect to the ubiquity of -- or  
14 accessibility of radio.

15 And I think if one looks at the FCC orders  
16 that this Court cited in its prior decision in this  
17 case, one would see that a lot of the most vile and lewd  
18 material really is in radio. So I just want to put that  
19 marker down at the beginning here because I do think it  
20 is quite important. No showing has been made about  
21 radio.

22 JUSTICE KENNEDY: I didn't quite understand  
23 that. Today there's a -- there is either a potential or  
24 a fact of violent and objectionable broadcasting in  
25 radio? I didn't quite understand your point.

1                   GENERAL VERRILLI:  Yes.  Pacifica itself,  
2 Justice Kennedy, was a case about a radio broadcast.

3                   JUSTICE KENNEDY:  Yes, I understand that.  
4 Yes.

5                   GENERAL VERRILLI:  And the Respondents are  
6 arguing in this case that Pacifica ought to be overruled  
7 because the circumstances that justified its rule no  
8 longer obtain.  I want to put a marker in at the outset  
9 here with respect to radio because I do think it's quite  
10 important, that they haven't made any argument that  
11 those circumstances are any different with respect to  
12 radio.  It's just as ubiquitous as it was.  There isn't  
13 even any argument that there is blocking technology  
14 available.  I want to make sure, given the kind of vile  
15 material that the record demonstrates has been  
16 transmitted over time on radio, that the Court focuses  
17 on the breadth of the argument that the Respondents are  
18 making here.

19                   Now, with respect to television, I do think  
20 they are making an argument that -- that television  
21 broadcasting is no longer uniquely pervasive in the way  
22 that it was before.  They are not making an argument --  
23 but that, if I may, is a very different kind of argument  
24 than one would normally get in support of a -- the  
25 suggestion that we ought to depart from stare decisis.

1                   They are not -- they are not arguing that  
2 broadcast television is any less pervasive than it was.  
3 If anything, it is probably more pervasive now. They  
4 are not arguing that the harms of that pervasiveness no  
5 longer exist. What they are arguing is that there is  
6 other media that present harms as well, and that with  
7 respect -- and that because those other media also  
8 present harms, the circumstances require a change in the  
9 rule with respect to broadcasters.

10                   Now that -- you can I think look at that in  
11 one of two ways. You could say either that's an  
12 argument that it's futile to continue to impose this  
13 restriction on broadcasters, and I think that's what Fox  
14 says at page 33 of its brief.

15                   Two points in response to that. I think a  
16 significant if not complete answer was in this Court's  
17 prior decision in this case in which it said that the  
18 maintenance of a safe haven is actually particularly  
19 important in -- in the context of these changes, a  
20 broadcast safe haven. And also I do think that the idea  
21 of futility in that nature is foreign to our First  
22 Amendment jurisprudence.

23                   JUSTICE GINSBURG: General Verrilli, I took  
24 it from the briefs and what the FCC has been doing that  
25 the major objection is that one cannot tell what's

1 indecent and what isn't; that it's FCC, the censor,  
2 that's saying "Private Ryan" is okay, "Schindler's List"  
3 is okay, but "NYPD Blue" is not. And I do think that  
4 that is the major objection, that we have a -- a  
5 government agency that is going to make decisions about  
6 when nudity is okay and when it isn't. You can't do it  
7 in terms of time because the "NYPD" was 7 seconds and  
8 another broadcast, "Catch-22," was 40 seconds.

9           So it's -- it's the appearance of  
10 arbitrariness about how the FCC is defining indecency in  
11 concrete situations. That I think is the nature of  
12 the --

13           GENERAL VERRILLI: Let me turn to that,  
14 Justice Ginsburg. The -- two points about that. The  
15 first one is that as we read this Court's recent  
16 decision in Humanitarian Law Project, the question on  
17 the Fifth Amendment analysis of whether there is  
18 vagueness and arbitrary enforcement has to be answered  
19 by reference to the specific broadcasts at issue here.  
20 In other words, was there fair notice with respect to  
21 these specific broadcasts?

22           And I will get to that, but I -- but let me  
23 first go directly to Your Honor's more significant  
24 question. And I think the -- the problem with looking  
25 at the case that way is that the lens is focused too



1 narrowly, in that there actually, when one broadens out  
2 the lens and looks at the wide range of decisions that  
3 the commission is making about indecency and then  
4 broadens it out even further and looks at the wide range  
5 of broadcasts that occur, actually the number of  
6 broadcasts are -- that have been identified as even  
7 raising a question of arbitrariness or inconsistency is  
8 a -- is really quite a miniscule fraction.

9           It's even quite a miniscule fraction even  
10 with respect to broadcasts that the commission has  
11 adjudicated as indecent or not indecent.

12           And yes, we would concede that there is not  
13 perfect clarity in this rule. It's a context-based  
14 rule. As we read *Pacifica*, the Court suggested in  
15 *Pacifica* that the context-based rule may well be what  
16 the Constitution requires here, and that's going to  
17 result in some -- something less than absolute  
18 precision. But the -- of course, the alternative, I  
19 would assume from my friend's perspective, would be  
20 worse. The commission could have a list that said:  
21 Never say the following however many words, never show  
22 broadcasting between the hours of 6:00 a.m. -- nudity  
23 between the hours of 6:00 a.m. and 10:00 p.m.

24           That would be clearer, but it would -- but  
25 in a way the commission here, I think by following the

1 context-based approach that I think Pacifica suggested  
2 was required, is being -- "punished" is too strong a  
3 word, but it's being held against it that it's trying to  
4 make reasonable accommodations for First Amendment  
5 values.

6           And so I think when one looks at it both in  
7 terms of where the lenses actually ought to be focused  
8 here and the fact that the -- the alternative perfect  
9 clarity would reach a less effective accommodation of  
10 First Amendment values, then I do think that the  
11 commission's position is quite reasonable and sensible.

12           JUSTICE BREYER: Could you -- could you  
13 digress for one minute to help me understand the  
14 procedural posture of this case. When it was here last  
15 time, we were dealing with an issue called fleeting  
16 expletives and that was Fox. And the Fox case involved  
17 just that. They didn't really, or we didn't, or the  
18 Court didn't, attack the 2001 order which is now at  
19 issue.

20           And then without it going back to the  
21 commission, the Second Circuit decided it on a ground  
22 that sets aside the 2001 order. Now, can we here just  
23 decide the fleeting expletive case, because the fleeting  
24 expletive case has to do with one subset of applications  
25 of the 2001 order and has to do with part 2.2 or

1 something. I mean, it has -- and how you interpret the  
2 words "material dwells on or repeats." Now, that I --  
3 I understand how to get at.

4 The ABC case raises -- doesn't raise  
5 fleeting expletives. It wasn't fleeting. And it raises  
6 the question of the validity of, under vagueness  
7 grounds, of 2001 industry guidance and how that's been  
8 applied. But the Second Circuit didn't deal with that  
9 case. It sent it back to the commission.

10 So has there been a commission decision  
11 recently which has reviewed the basic arguments being  
12 made here about the validity of the 2001 industry  
13 guidance as applied? Has there been such a thing?

14 Alternatively, has there been an appeals  
15 court holding on the analysis of the ABC case?

16 GENERAL VERRILLI: I do -- I agree with you,  
17 Justice Breyer, A, that this is a complex procedural  
18 posture; B, that the Court would have some discretion in  
19 how it approached and resolved the case.

20 With respect to the ABC case, as I read the  
21 commission's orders, which are in the appendix to the  
22 petition, it applied the 2001 industry guidance to reach  
23 the conclusion that the ABC broadcast was indecent. And  
24 then that was -- that -- then ABC appealed that to the  
25 Second Circuit, as I understand it, and that the Second

1 Circuit then found that the commission had violated the  
2 Constitution in reaching that result.

3 JUSTICE BREYER: But they didn't -- they  
4 didn't in that case, and they sent the ABC case back --  
5 I see your --

6 GENERAL VERRILLI: They did on -- when it  
7 came back, Your Honor, they then, they disposed of the  
8 Fox case with a lengthy opinion and then essentially  
9 applied that analysis to the ABC case. So I think in  
10 fairness --

11 JUSTICE BREYER: All right. When this ABC  
12 case was argued in front of the commission, I have here  
13 about 30 briefs at least, maybe 40, and they are filled  
14 with very good arguments. Were those arguments made to  
15 the commission in the context of the ABC case? Because  
16 as it comes up here, we are -- whereas I thought when we  
17 granted cert, quite honestly, that this was Fox coming  
18 back, as I've read the brief it isn't at all. This is a  
19 new case, nothing to do with what we decided before.  
20 This is the case of ABC, period. And it is an attack on  
21 the 2001 guidelines, not fleeting expletives.

22 And therefore, I want to know, at least  
23 satisfy myself, that this Fox -- this ABC case has gone  
24 through ordinary procedures and indeed these arguments  
25 have all been made in front of the commission and they

1 have been rejected.

2 GENERAL VERRILLI: So, Justice Breyer, I'm  
3 not sure that I can vouch for the proposition that the  
4 arguments have all been made in front of the commission.

5 JUSTICE BREYER: I'm not saying every one,  
6 but has the essence of these arguments --

7 GENERAL VERRILLI: In fairness, I do think  
8 that if one reads the commission's disposition of the  
9 ABC case, it is applying the 2001 guidance reaching the  
10 conclusion that the broadcast was indecent under the  
11 2001 guidance. ABC paid the fine that it was assessed,  
12 and then, as it has -- as it can do, then invoked the  
13 Hobbs Act and went to the court of appeals to challenge  
14 it. And so I do think -- I do actually think that the  
15 issues have been considered by the agency and are before  
16 the Court.

17 And I do agree with Your Honor, moving I  
18 think more directly to the vagueness point, that there  
19 really isn't a vagueness issue left with respect to the  
20 fleeting expletives in the Fox case, because the Court  
21 said the last time the case was here that there is no  
22 problem of arbitrary punishment because there was no  
23 forfeiture or any other sanction.

24 ABC is in a different position because they  
25 were sanctioned. And so there is an issue with respect

1 to the question of whether the commission's indecency  
2 standards can constitutionally be applied here and  
3 whether they are too vague. But I do think, and I would  
4 like to spend a minute on that question of whether there  
5 is vagueness as applied to the ABC broadcast.

6 Now, the commission's standards in the 2001  
7 guidance say that this is essentially a two-part test.  
8 First is a subject matter question: Is there a  
9 description or depiction of sexual or excretory  
10 activities or organs? And then there is the question of  
11 whether the depiction or description is patently  
12 offensive under community standards for broadcast  
13 informed by three factors: Whether the expression is  
14 explicit; whether the broadcast dwells on it; and  
15 whether it's shocking or pandering or titillating.

16 Now, ABC makes an argument with respect to  
17 this broadcast that the nudity in the "NYPD Blue"  
18 episode is outside of the first subject matter criteria  
19 because it didn't have fair notice that buttocks would  
20 be considered sexual organs for purposes of application  
21 of this -- of this standard.

22 The commission said, and this is at page  
23 137a of the appendix to the petition, that it's  
24 impossible to believe that they didn't think that the  
25 naked display of buttocks would bring them within --

1 that they didn't have fair notice that the naked display  
2 of buttocks would bring them within this rule. I'm not  
3 sure anything more needs to be said about that.

4 JUSTICE KAGAN: Well, the broader point,  
5 General Verrilli, isn't it, is that no matter -- even if  
6 you are right that there are many non-vague applications  
7 of this commission policy, that there is some amount of  
8 uncertainty and ABC finds itself in that area of  
9 uncertainty --

10 GENERAL VERRILLI: I don't --

11 JUSTICE KAGAN: -- because it turns out that  
12 nudity -- that there really -- sometimes it's allowed as  
13 to some body parts and sometimes it's not allowed, and  
14 the commission hadn't really said anything about it for  
15 50 years, and the length of time doesn't seem to be  
16 what's indicative of anything, the kind of body part  
17 doesn't seem to be, with some limits, what is indicative  
18 of anything, so that ABC just didn't really know.

19 GENERAL VERRILLI: With respect, Justice  
20 Kagan, I really disagree with that characterization of  
21 the situation.

22 Moving to the second part of the analysis  
23 here, I think it's important to take a half a step back.

24 The fact of the matter is, and I think  
25 everybody, all of us, understands in our experience,

1 that nudity on broadcast television is an exceedingly,  
2 exceedingly rare thing at any time of the day, and  
3 certainly between 6:00 a.m. and 10 p.m. It is  
4 exceedingly rare, and all of us from our experience know  
5 that. And the --

6 JUSTICE GINSBURG: Well, I'm not so sure,  
7 because the examples were given of I guess excerpts from  
8 "Private Ryan" and from "Schindler's List," have been on  
9 television.

10 GENERAL VERRILLI: Yes, that's true, Justice  
11 Ginsburg. But again I think that's another issue about  
12 where the lens is focused. There have been thousands  
13 and thousands and thousands of broadcasts, and the  
14 Respondents have identified four in which -- over  
15 25 years, in which any nudity has been present.

16 JUSTICE SCALIA: They have their own  
17 guidelines that generally prohibit it, don't they?

18 GENERAL VERRILLI: That is certainty true,  
19 Justice Scalia. And I do think in Reno this Court  
20 described the Carlin monologue at issue in Pacifica in  
21 the following way. It said that monologue was readily  
22 identifiable as indecent because it was a dramatic  
23 departure from the customary norms for the broadcast  
24 medium. I think the kind of nudity -- and I think if  
25 one just looks at the video here and sees it, I think



1 it's hard to disagree with the proposition that that is  
2 a dramatic departure from what's the norm for broadcast  
3 television.

4 JUSTICE GINSBURG: If they did an excerpt  
5 from "Hair," could they televise that?

6 GENERAL VERRILLI: I think it would raise  
7 serious questions. I think nudity is going to raise  
8 very serious questions, and I think--

9 JUSTICE GINSBURG: In the opera in the  
10 "Metropolis" case there's a scene where a woman is seen  
11 nude entering a bathtub. Suppose that were shown, that  
12 scene from the opera.

13 GENERAL VERRILLI: Well, I don't -- I think,  
14 Justice Ginsburg, that in a context-based approach,  
15 there's not going to be perfect clarity. We recognize  
16 that. But I do think with respect to this broadcast,  
17 and that's the question before the Court, whether Fox --  
18 excuse me, whether ABC was on fair notice of whether  
19 this broadcast would bring them within the rule.

20 JUSTICE KENNEDY: What -- what you're saying  
21 is, is that there is a public value in having a  
22 particular segment of the media with different standards  
23 than other segments. And forget radio. Let's just talk  
24 about television. But -- you know, in the briefs, it  
25 says how much -- how many cable stations there are, and

1 you, what do you call it, you surf the -- you go through  
2 all the channels. And it's not apparent to many people  
3 which are broadcast and which are not.

4 But you're saying that there's still a  
5 value, an importance, in having a higher standard or  
6 different standard for broadcast media on the  
7 television. Why is that, when there are so many other  
8 options, and -- and when it's not apparent to many  
9 viewers which of the two they're watching? Just because  
10 it's an important symbol for our society that we aspire  
11 to a culture that's not vulgar in -- in a very small  
12 segment?

13 GENERAL VERRILLI: Two points in response to  
14 that, Justice Kennedy.

15 First, I think the Court's previous decision  
16 in this case goes a long way to providing an answer,  
17 that yes, it does make a difference to preserve a safe  
18 haven where if parents want to put their kids down in  
19 front of the television at 8:00 p.m., they know that  
20 there's a segment of what's available that -- where  
21 they're not going to have to worry about whether the  
22 kids are going to get bombarded with curse words or  
23 nudity. And --

24 JUSTICE KENNEDY: Well, but --

25 JUSTICE KAGAN: But this goes --

1 JUSTICE KENNEDY: And then there's -- and  
2 then there's the chip that's available. And of course,  
3 you ask your 15-year-old, or your 10-year-old, how to  
4 turn off of the chip. They're the only ones that know  
5 how to do it.

6 (Laughter. )

7 That does point out the problem with the  
8 V-Chip, Of course, the V-Chip is not new. It's been  
9 around for more than a decade, and the -- the broadcasters  
10 have tried to encourage uptake. The government has  
11 tried to encourage uptake. But -- but is your point  
12 is that the chip technology works better if you have  
13 this differentiation between broadcast and cable media?

14 GENERAL VERRILLI: No, a different point. I  
15 think that -- I want to get to what I think is the  
16 fundamental point here, that whatever may be the case  
17 with respect to the ability of a viewer to differentiate  
18 whether something is a broadcast channel or a cable  
19 channel, the reality is that broadcasters are in a  
20 different position by virtue of the fact that they have  
21 a license from the government that comes with this  
22 enforceable public obligation that allows the government  
23 to create this safe haven, and that puts them in a  
24 different position.

25 JUSTICE KENNEDY: Well, in a way, that's

1 circular. That's what we're here to argue about. I'm  
2 asking, is there a functional, pragmatic, practical  
3 difference between the two?

4 GENERAL VERRILLI: Is there -- well, I'm  
5 sorry, Justice Kennedy. The V-Chip works with both  
6 broadcast and cable transmissions, to the extent it  
7 works. The -- what the briefs have pointed out -- and I  
8 would suggest in particular that the Court look at the  
9 brief from the American Academy of Pediatrics, which  
10 does a very thorough job in explaining the many ways in  
11 which the V-Chip has proven to be a deficient  
12 technology.

13 A lot of it goes to the inaccuracy and  
14 incompleteness of the codes, the labels that the  
15 programmers put in to begin with, which have to be there  
16 in order for the V-Chip to decide what gets through and  
17 what doesn't.

18 And I would point out in this very case, for  
19 example, with respect to the -- for example, the 2003  
20 Billboard Music Awards broadcast with the Paris Hilton-  
21 Nicole Richie back and forth, one would never have known  
22 from the code affixed for the V-Chip purpose that that  
23 broadcast was going to have those kinds of words in  
24 them.

25 JUSTICE ALITO: What will happen when --

1 when we get to the point where -- when there are only a  
2 handful of people in the entire country who are still  
3 receiving television programs via the airwaves?

4 GENERAL VERRILLI: Well, I do think we're  
5 not there now, as we've said in our brief.

6 JUSTICE KAGAN: We're almost there, right?  
7 10 percent?

8 GENERAL VERRILLI: But that -- but I think  
9 that really makes what I think is one of the most  
10 fundamental points here, is that the broadcasters want  
11 to have it both ways, right? They -- the spectrum  
12 licenses they have are worth billions and billions of  
13 dollars. Spectrum is staggeringly, staggeringly scarce,  
14 and -- and they're sitting on an enormously valuable  
15 resource which they got for free, and then they have a  
16 statutory benefit of must-carry, which gets them on  
17 cable systems automatically, and a further statutory  
18 benefit of preferred channel placement on -- on those --

19 JUSTICE SCALIA: Sign -- sign me up as  
20 supporting Justice Kennedy's notion that this has a  
21 symbolic value, just as we require a certain modicum of  
22 dress for the people that attend this Court and the  
23 people that attend other Federal courts. It's a  
24 symbolic matter.

25 And if this is -- these are public airwaves,

1 the government is entitled to insist upon a certain  
2 modicum of decency. I'm not sure it even has to relate  
3 to juveniles, to tell you the truth.

4 GENERAL VERRILLI: And we certainly agree,  
5 Justice Scalia, with the point that was made in the  
6 Court's previous decision in this case, that -- for  
7 example, the words that are in the Fox broadcast,  
8 teachers don't use those words with students. You don't  
9 hear those words in churches or synagogues. You --  
10 there are many, many contexts --

11 JUSTICE SCALIA: Well, you do more and more.  
12 You do more and more, since there's --

13 (Laughter.)

14 JUSTICE SCALIA: -- since there's so much of  
15 it on --

16 GENERAL VERRILLI: If I think if I may --

17 JUSTICE GINSBURG: You are saying that the  
18 standard can still be symbolic, as Justice Scalia said.  
19 We want the King's English -- for the very children  
20 we're talking about when they go on the street, when  
21 they -- their big brother says something to them, it  
22 is -- the words that were, the expletives, are in common  
23 parlance today. I mean, it is -- I think that  
24 children -- the children are not going to be shocked by  
25 them the way they might have been a generation ago.

1                   GENERAL VERRILLI: Justice Ginsburg,  
2 something this Court said in its prior decision is right  
3 on the mark with respect to this issue, which is it's a  
4 question of whether it's portrayed as appropriate. And  
5 when it is -- it's one thing when your 13-year-old  
6 brother is saying it to you or some bully in the  
7 schoolyard's saying it to you.

8                   It's another when it's presented to you in  
9 this medium as an appropriate means of communication.  
10 That's true with respect to words, and it's also true  
11 with respect to nudity.

12                   If I might reserve the balance of my time.

13                   CHIEF JUSTICE ROBERTS: Thank you, General.  
14 Mr. Phillips.

15                   ORAL ARGUMENT OF CARTER G. PHILLIPS

16                   ON BEHALF OF THE RESPONDENTS

17                   FOX TELEVISION STATIONS, INC., ET AL.

18                   MR. PHILLIPS: Thank you, Mr. Chief Justice,  
19 and may it please the Court:

20                   I'd like to respond initially to some of  
21 General Verrilli's general observations. First of all,  
22 he talks about indecency as somehow serving as the core  
23 of the overall understanding of the regulatory deal that  
24 was made here. And it's difficult for me to accept that  
25 notion when there was no effort whatsoever to enforce

1 the standard of indecency between 1927 and 1975.

2 CHIEF JUSTICE ROBERTS: Well, that's because  
3 broadcasts didn't commonly have this sort of -- these  
4 sorts of words or these sorts of images.

5 MR. PHILLIPS: Well, maybe, maybe not. We  
6 don't know. All we know is that for a period of  
7 50 years, nothing happened, so the idea --

8 CHIEF JUSTICE ROBERTS: We know. We know.  
9 We can -- it was not the case from 1927 until  
10 whenever you -- what, 1970-something -- that nudity  
11 commonly appeared on broadcast television or the various  
12 words we're dealing with here commonly appeared. So it  
13 seems a bit much to say well, they didn't bring any  
14 cases for that period. There were no cases to be  
15 brought.

16 MR. PHILLIPS: The only point I'm trying to  
17 make, Chief Justice, is that if you're talking about  
18 this as sort of the core understanding between the  
19 parties, it simply played a fairly minor role in the  
20 process through the bulk of the regulatory period we're  
21 talking about. And indeed, if you put it in context,  
22 this is a statute that prohibits obscenity, profanity  
23 and indecency. And while the FCC spent a lot of time  
24 writing about profanity as somehow being offended by  
25 what went on in this omnibus order, the commission has



1 completely abandoned that under the --

2 JUSTICE KAGAN: How about this,

3 Mr. Phillips: Look, you've been given a privilege and  
4 that gives the government at least somewhat more leeway  
5 to impose obligation on you. Not -- can't impose  
6 everything, but at least has a bit more leeway. And  
7 here we've had something that's very historically  
8 grounded. We've had this for decades and decades that  
9 the broadcast is -- the broadcaster is treated  
10 differently.

11 It seems to work and it -- it seems to be a  
12 good thing that there is some safe haven, even if the  
13 old technological bases for that safe haven don't exist  
14 anymore.

15 So why not just keep it as it is?

16 MR. PHILLIPS: Well, first of all, Justice  
17 Kagan, it was important to catch the answer to your  
18 question when you asked it of General Verrilli, which  
19 was, you're not saying that we lose all of our First  
20 Amendment rights. So clearly we retain our First  
21 Amendment rights.

22 And under those circumstances, it seems to  
23 me you've got just two ways. First of all, the idea  
24 that it, quote, "worked," it worked perfectly fine from  
25 all the way up until 2001, even I would say until 2004,

1 when the commission wildly changed its approach. And  
2 it's only become dysfunctional since 2004.

3 And as we sit here today, literally facing  
4 thousands and thousands of ginned-up computer-generated  
5 complaints that are holding up literally hundreds of TV  
6 license renewals, so that the whole system has come to a  
7 screeching halt because of the difficulty of trying to  
8 resolve these issues.

9 So to say that the system is working well  
10 seems to me, at least from the broadcasters'  
11 perspective, is to suggest that's just not true.

12 JUSTICE ALITO: Well, you want us to  
13 overrule a decision of this Court, Pacifica?

14 MR. PHILLIPS: Yes, Justice.

15 JUSTICE ALITO: Now, as to radio, what has  
16 changed?

17 MR. PHILLIPS: I'm not here --

18 JUSTICE ALITO: -- to justify that? Well,  
19 could we hold that the policy is invalid as to -- on  
20 First Amendment grounds as to TV but not as to radio?

21 MR. PHILLIPS: Absolutely, Your Honor,  
22 because there are fundamentally different media and  
23 there are different protections and the circumstances  
24 are different and the Court has recognized that media  
25 have to be evaluated individually. But what has

1 happened over the 30 years with respect to the broadcast  
2 side of television is a very fundamental change. Cable  
3 is now equally pervasive. Cable is now equally  
4 accessible to TV, satellite equally accessible to TV.

5 CHIEF JUSTICE ROBERTS: But that cuts both  
6 ways. People who want to watch broadcasts where these  
7 words or expose their children to broadcasts where these  
8 words are used, where there is nudity, there are 800  
9 channels where they can go for that. All we are asking  
10 for, what the government is asking for, is a few  
11 channels where you can say I'm not going to -- they are  
12 not going to hear the S word, the F word. They are not  
13 going to see nudity. So the proliferation of other  
14 media it seems to me cuts against you.

15 MR. PHILLIPS: Well, it seems to me there  
16 are two answers to that. First of all the notion that  
17 one medium operates in a certain way in the exercise of  
18 its First Amendment rights can be used as an explanation  
19 for taking away or for restricting the First Amendment  
20 rights of another medium is flatly inconsistent with  
21 what this Court has said across the board in the First  
22 Amendment context. You don't balance off one speaker  
23 against another and give one favored status and give  
24 another unfavored status.

25 CHIEF JUSTICE ROBERTS: Well, that's your

1 argument there, is that it's not a legitimate objective  
2 to have a safe harbor.

3 MR. PHILLIPS: Well, you can get a safe  
4 harbor, And indeed there are a number of safe harbors  
5 that are out there. First of all, there are a ton of  
6 cable networks that are aimed exclusively at children.  
7 There are five, six, eight stations that I guarantee you  
8 where you will see none of that language.

9 And second of all, it's always available to  
10 the United States Government to decide to hold this --  
11 to create its own license for the United States to be a  
12 broadcaster and to ensure that the broadcasts of the  
13 United States public network exclude anything they want  
14 to exclude, because that's government speech, and it is  
15 in no way restricted by what the First Amendment would  
16 provide.

17 JUSTICE ALITO: But if we rule in your favor  
18 on First Amendment grounds, what will -- people who  
19 watch Fox be seeing between 6:00 a.m. and 10:00 p.m.?  
20 Are they going to be seeing a lot of people parading  
21 around in the nude and a stream of expletives?

22 MR. PHILLIPS: Not under the guidelines that  
23 Fox has used consistently from 10:00 p.m. until  
24 6:00 a.m. and candidly that all of the other networks  
25 follow.

1                   The truth is the advertisers and the  
2 audiences that have to be responded to by the networks  
3 insist on some measure of restraint, not a measure  
4 of restraint --

5                   JUSTICE ALITO: So what will you put on that  
6 you are not able to put on now?

7                   MR. PHILLIPS: Well, some of the things that  
8 we could at least wonder about is "Saving Private Ryan,"  
9 "Catch-22," perhaps the beginning of the Olympics.  
10 There is a whole slew of questions, I mean. And if you  
11 go beyond that and you think about what speech has been  
12 chilled, the Tillman memorial service is not broadcast  
13 because of fear of what's going to be said there.  
14 Football games, basketball games, local news events --

15                   JUSTICE BREYER: All right, so suppose we  
16 take that particular line. You didn't argue -- I mean,  
17 Fox didn't argue -- Fox was worried about the fleeting  
18 expletive policy in Golden Globe. I doubt in Golden  
19 Globe, when it was before the commission, they raised  
20 all these vagueness challenges to the whole 2001 policy.  
21 So why -- here you have taken a much broader stance,  
22 now, though you didn't before. I mean do you want to  
23 say anything about what I think is the basic issue that  
24 Fox raises? We don't have to overrule Pacifica. What  
25 Fox was penalized for was two women on television who

1 basically used a fleeting expletive which seems to be  
2 naturally part of their vocabulary.

3 (Laughter.)

4 JUSTICE BREYER: And we're worried about  
5 small stations that cannot censor people because they  
6 don't know what they are going to say. All right, that  
7 is what we wrote, I think in my opinion, anyway. We  
8 were worried about that.

9 MR. PHILLIPS: Right.

10 JUSTICE BREYER: Are you abandoning that  
11 argument?

12 MR. PHILLIPS: No, no, no, of course not.  
13 But you have to realize, Justice Breyer, I mean the  
14 Second Circuit, because it didn't have available to it  
15 sort of what to do precisely with *Pacifica*, tended to  
16 focus on the question of vagueness. Vagueness was  
17 certainly an argument that we made there, but --

18 JUSTICE BREYER: It's an A, B, C argument  
19 primarily. But you made that argument in the Second  
20 Circuit. What I am fishing with, you don't have to  
21 comment more, but -- is do we have to reach that  
22 argument? It's --

23 MR. PHILLIPS: No --

24 JUSTICE BREYER: It's very, very broad.

25 MR. PHILLIPS: No. It's absolutely clear to

1 me that if this Court wants to say we decided the outer  
2 limits of the 1st Amendment in *Pacifica* and it goes to  
3 the verbal shock treatment that Justice Powell described  
4 in a separate opinion, and this doesn't come anywhere  
5 near that, and therefore this is beyond what the 1st  
6 Amendment provides, the Court can clearly hold that way  
7 and --

8 JUSTICE SCALIA: Well, that's not really  
9 clear. I mean, if you want us to be really clear you  
10 should ask the FCC to simply outlaw any fleeting use of  
11 the F word or the S word, any shots of any nudity in any  
12 movie, buttocks included; that would give you all of the  
13 notice that you need. Why don't you propose that? Boy,  
14 that's certain as can be.

15 MR. PHILLIPS: Well, our basic argument  
16 would then -- I mean, obviously what -- you would be  
17 taking away the vagueness argument, but that would just  
18 bring you back then, Justice Scalia, to the core  
19 *Pacifica* argument and the question of how far can the --  
20 how is it permissible to allow the FCC to regulate the  
21 broadcast networks on standards that are fundamentally  
22 different than cable, the internet and every other  
23 medium that exists? I would be perfectly happy if they  
24 want to try to adopt those kinds of standards and  
25 subject them to the strict scrutiny requirements that

1 this Court applies to every other medium because the  
2 truth is those requirements will not withstand scrutiny  
3 under those particular standards.

4 JUSTICE ALITO: Well, broadcast TV is living  
5 on borrowed time. It is not going to be long before it  
6 goes the way of vinyl records and 8 track tapes.

7 MR. PHILLIPS: I hope that -- I'm sure my  
8 client is not thrilled to have you say that.

9 JUSTICE ALITO: Well, I'm sure --  
10 (Laughter.)

11 JUSTICE ALITO: I'm sure your clients will  
12 continue to make billions of dollars on their programs  
13 which are transmitted by cable and by satellite and by  
14 internet. But to the extent they are making money from  
15 people who are using Rabbit ears, that is disappearing.  
16 Do you disagree with that?

17 MR. PHILLIPS: No, I -- it would be -- you  
18 know, obviously not, because that's why we are not  
19 uniquely accessible or uniquely pervasive.

20 JUSTICE ALITO: Yeah. So why not let this  
21 die a natural death? Or why do you want us to  
22 intervene --

23 (Laughter.)

24 MR. PHILLIPS: Well, because -- well, we  
25 didn't ask you to intervene, actually the FCC is going



1 to ask you to intervene --

2 JUSTICE ALITO: But you are asking us to  
3 intervene by overruling a prior precedent.

4 MR. PHILLIPS: Well, I believe -- well, I  
5 think once the issue is before the Court it ought to  
6 decide the 1st Amendment question that's presented here.  
7 And the 1st Amendment question says what can the FCC do  
8 under these circumstances. It seems to me there are  
9 probably 4 different ways you can go about it, all of  
10 which says what the FCC did here is wrong. You can say  
11 *Pacifica* is an exceedingly narrow decision and it goes  
12 to the outer limits of what the 1st Amendment allows the  
13 FCC to do. What they have done here is  
14 unconstitutional.

15 JUSTICE KENNEDY: But isn't the inevitable  
16 consequence or this precise consequence that you're  
17 arguing for on this fleeting expletive portion of this  
18 case, that every celebrity or want to be celebrity that  
19 is interviewed can feel free to use one of these words.  
20 We will just expect it as a matter of course, if you  
21 prevail. Isn't that the necessary consequence of this  
22 case?

23 MR. PHILLIPS: Well, that they will use it,  
24 perhaps. But that doesn't mean that we wouldn't  
25 continue to try to bleep it out as best we could.

1 Because we have our own --

2 JUSTICE KENNEDY: Well, I mean even you did  
3 in tis one, you said now remember you're on television,  
4 which was just -- giving an added incentive for these  
5 vulgar comments.

6 MR. PHILLIPS: Well, that was clearly not --  
7 I mean from Fox's perspective it was not scripted to set  
8 it up that way. But, remember, the first -- the first  
9 expletive --

10 JUSTICE KENNEDY: But, I mean, isn't it  
11 inevitable that this will happen?

12 MR. PHILLIPS: It is inevitable that --  
13 well, I think it's inevitable regardless that people are  
14 going to continue to use language that they would  
15 naturally use. So yes, I do think you can expect on  
16 cable and any other forum in which you have humans  
17 speaking that this kind of language will expand. I  
18 don't know that it -- and it will probably be the case  
19 that in some context, particularly live television,  
20 which is really what is placed in jeopardy by this, that  
21 you will have less live television because your concern  
22 is people will continue to use this language.

23 On a lot of awards shows I think it's  
24 candidly easier to go ahead and bleep this. It's not  
25 always -- it's not foolproof, but the stations are

1 committed to doing that. They have all got their  
2 standards and that was applied in this particular case.  
3 So while there may be some marginal increase in it, if  
4 you compare it to the use of this language beyond the  
5 broadcast context, it is just the narrowest of slivers  
6 of entry --

7 JUSTICE KAGAN: Do you think that there is a  
8 difference between what a person sees on broadcast  
9 channels and what a person sees on basic cable? Basic  
10 cable now?

11 MR. PHILLIPS: Can the average child  
12 understand of the difference between the two --

13 JUSTICE KAGAN: No, in content. Is there a  
14 difference in content? Because basic cable channels are  
15 not restricted by these rules, and I am just wondering  
16 whether you think there is a difference. Because I --  
17 it has not been apparent to me that there is.

18 MR. PHILLIPS: Well, I mean, in some show --  
19 I think it probably depends on which -- which channels  
20 you -- you look at, and even in the basic channels. But  
21 the -- there is a cartoon that is significantly more  
22 adult that is on the cable channels than the cartoons  
23 that you might see on the -- on the Fox Television.

24 So yes, I think there is probably a certain  
25 edgierness to it, but that said, it's still clear

1 that -- that as long as you have advertising revenue  
2 that -- that drives a significant amount of the  
3 decisionmaking here, you are going to have the kind of  
4 self-restraint that frankly ought to cause the Court to  
5 say we should no -- we no longer need to treat the  
6 broadcast medium as the weak sister of -- of the media.

7           And therefore they ought to have the same  
8 protections that everybody else has, and that they will  
9 engage in the same restrained approach to these kinds of  
10 issues that newspapers do -- I mean, the Post doesn't  
11 run the language of the case that's - that's being  
12 argued before it -- that cable does, all of those media  
13 do; because there are natural restraints. You don't  
14 need the Federal Communications Commission any longer to  
15 ensure under these circumstances.

16           JUSTICE SCALIA: What you acknowledge to be  
17 the vulgarity of cable suggests otherwise, doesn't it?

18           MR. PHILLIPS: Well, I'm not suggesting that  
19 there is -- there is some kind of wildly different  
20 approach. All I am suggesting is that there -- that in  
21 general most people who -- who rely upon advertising and  
22 have to play to a particular audience in order to make  
23 their money, it's going to -- it's going to obviously be  
24 restrained.

25           CHIEF JUSTICE ROBERTS: Well, that depends

1 what your audience --

2 MR. PHILLIPS: But at a minimum broadcasting  
3 will be --

4 CHIEF JUSTICE ROBERTS: It depends on what  
5 audience you're -- you're trying to get, and the  
6 demographic. If you are trying to get an audience that  
7 is older, maybe you will decide this is what is going to  
8 attract them. They don't want sanitized language. They  
9 want to hear the -- the -- all those other words. If  
10 your target is a much younger audience, maybe that will  
11 happen. But the idea that you're -- the problem is  
12 going to go away because you are going to be good as you  
13 can be, that seems an odd way to analyze First Amendment  
14 problems.

15 MR. PHILLIPS: Well, no, I think it ought to  
16 go -- it ought to be analyzed the exact opposite, which  
17 is that -- that the -- the obligation, the burden rests  
18 on the Federal Communications Commission and Congress to  
19 show that there is a real problem that needs to be  
20 solved and that this is narrowly tailored to achieve  
21 that.

22 Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,  
24 Mr. Phillips.

25 Mr. Waxman.

1 ORAL ARGUMENT OF SETH P. WAXMAN  
2 ON BEHALF OF THE RESPONDENTS  
3 ABC, INC., ET AL.

4 MR. WAXMAN: Mr. Chief Justice, and may it  
5 please the Court:

6 When the issue is the content-based  
7 regulation of speech, it is the government, not the  
8 speaker, that must steer, quote, "far wide of the  
9 prohibited zone." That foundational principle is  
10 nowhere in evidence in the FCC's current enforcement  
11 regime, which not only intrudes into the prohibited zone  
12 but also enforces the indecency ban in a starkly  
13 inconsistent manner.

14 A regime in which government officials  
15 decide years after the fact that 7 seconds of rear  
16 nudity in this particular episode of "NYPD Blue" is  
17 indecent, but 40 seconds of nudity including full  
18 frontal nudity in "Catch-22" is not; that expletives in  
19 a documentary about blues musicians is indecent, but  
20 even more of those expletives in a fictional movie about  
21 World War II is not, is constitutionally intolerable.

22 CHIEF JUSTICE ROBERTS: People understand --  
23 what you have demonstrated I think is that the context  
24 matters. People understand that, including children.  
25 When they hear a bad word when someone hits their thumb

1 with a hammer, they understand that's different than  
2 having an adult stand in normal conversations and use  
3 the words. And it seems to me that your position is  
4 saying that the government cannot regulate with an  
5 understanding of what takes place in the real world.

6 The government's effort is to try to  
7 understand the context. That's why you get a different  
8 rule in "Saving Private Ryan" than you get with Paris  
9 Hilton and Nicole Richie. And what your argument seems  
10 to be is they can't take context into account.

11 MR. WAXMAN: On -- quite the contrary. This  
12 Court made clear, in particularly Justice Powell's  
13 concurrence in *Pacifica*, that context is all-important.  
14 And just look at this case. Despite -- and this goes  
15 directly to some of these questions about nudity --  
16 despite decades of denying complaints about televised  
17 nudity, the commission chose this case for the first  
18 time to sanction nudity on television in a serious drama  
19 that had been on for 10 years that had featured over --

20 JUSTICE BREYER: But this wasn't -- I mean,  
21 I -- don't know about this instance. It's called "Nude  
22 Awakening," it's about the sexual awakening of a child.  
23 You ran it, your client, after 10:00 on both coasts and  
24 they choose to run it at 9:00 for some unknown reason in  
25 the Midwest. Maybe they thought -- I don't know,

1 whatever.

2 (Laughter.)

3 MR. WAXMAN: I --

4 JUSTICE BREYER: But my point is what the  
5 FCC terribly told you to do was run it 1 hour later in  
6 the Midwest, just as you did on the coast.

7 MR. WAXMAN: Yes.

8 JUSTICE BREYER: And -- and why is that  
9 not -- I'm not saying, taking this point of view, but  
10 I'm saying why -- isn't that just time, manner and  
11 circumstance that puts you to very little trouble, and  
12 allows everybody to see it, and therefore is  
13 constitutional?

14 MR. WAXMAN: The -- this is not some sort of  
15 obscure, unknown reason. This show was run across the  
16 country in the last hour of prime time which happens to  
17 be from 9:00 to 10:00 p.m. in the Midwest and Mountain  
18 Time zones.

19 JUSTICE BREYER: Because you wanted to make  
20 more money from it, I understand that. And maybe people  
21 would have been a little bit inconvenienced, but the  
22 inconvenience -- they made a judgment that looking at  
23 this show is not like "Private Ryan," it's about sexual  
24 awakening; they are showing a part of a nude woman, the  
25 viewer is supposed to put himself in the position of the



1 boy who is seeing her, and the whole thing was  
2 titillating.

3 Now they might be wrong; there are two sides  
4 to that argument; and so I guess what you are arguing  
5 is, if I were to say is that a reasonable view -- I  
6 guess I would have to say it. But you have to say much  
7 -- you are telling me I have to say much more than that.

8 MR. WAXMAN: Well, number -- yes. Number  
9 one, it is not a reasonable view, for reasons I will  
10 explain. It was not sexual awakening; this was a  
11 portrayal in the context of a story line about the  
12 difficulties and embarrassments of blended families.  
13 This was an exploration of one of the things that  
14 happens, which is a little boy stumbles in and watches a  
15 woman in the quotidian activity of preparing her morning  
16 shower. In any event, the commission for years had been  
17 adjudicating complaints about nudity, and I -- I --

18 JUSTICE BREYER: All right.

19 MR. WAXMAN: It is simply untrue -- it is  
20 simply untrue that this had never occurred before.  
21 "NYPD Blue" itself was in its tenth season. The very  
22 first episode which caused a lot of media attention  
23 included a nude scene of love making. It was the  
24 subject of any number of complaints.

25 JUSTICE BREYER: You're going off the

1 question.

2 MR. WAXMAN: Okay.

3 JUSTICE BREYER: Which -- you haven't seen  
4 where I'm going. I wanted you to say just exactly what  
5 you said, and you did, which I thank you --

6 (Laughter.)

7 JUSTICE BREYER: And -- and my question,  
8 which I have been trying to get so you would see very  
9 precisely what it is, is why don't I just say, if you  
10 are right, just what you said? And say this is an  
11 instance, case-by-case, in which, for the reasons and I  
12 quote you, that the First Amendment forbids the  
13 application of a good guideline to this case. In other  
14 words, what I'm driving at is the basic thing that's  
15 worrying me here: Does this case in front of us really  
16 call for the earthshaking decision that you all have  
17 argued for in the -- in the briefs?

18 And that's what I'm trying to figure out,  
19 and that's why I am particularly worried about whether  
20 or not this whole big argument here was presented to the  
21 FCC about whether we have to reach that far. Now do you  
22 see where I was trying to get?

23 MR. WAXMAN: I think so.

24 JUSTICE BREYER: All right.

25 MR. WAXMAN: And if not, I -- I hope you

1 will tell me. First of all, the -- the -- both the  
2 First Amendment and Fifth Amendment issues were fully  
3 argued in front of the commission, and the commission  
4 addressed them in its decision in the ABC case.

5 We, of course, didn't ask the -- or suggest  
6 to the commission that it should no longer apply  
7 *Pacifica* because the factual predicates for more relaxed  
8 scrutiny didn't apply, as we didn't in the Second  
9 Circuit, because only this Court can reconsider the  
10 application of that standard. So that's an argument we  
11 are making here.

12 That argument is not necessary to resolving  
13 this case, either on First or Fifth Amendment grounds.  
14 This broadcast -- and particularly in light of the  
15 ubiquitous V-Chip, this broadcast is not actionably  
16 indecent under *Pacifica*, number one. With respect to  
17 notice or the vagueness of the application to this show,  
18 clearly this was a shot out of the blue.

19 The commission cannot identify -- I  
20 challenge the commission to identify a single decision  
21 of the commission issued before this was broadcast in  
22 2003 in which it had sanctioned any display of nudity,  
23 and I'm going all the way back to 1978.

24 JUSTICE KENNEDY: By -- by sanctioned, you  
25 mean punished as rather -- as opposed to sanctions?

1 MR. WAXMAN: Yes, yes, yes. Sanctioned in  
2 the "ouch" sense.

3 (Laughter.)

4 JUSTICE SCALIA: How many displays -- how  
5 many displays of nudity were there that -- that went  
6 unsanctioned?

7 MR. WAXMAN: Well, for -- I can't tell you,  
8 but I can tell you --

9 JUSTICE SCALIA: Well, I mean, if there are  
10 very few, it's -- it's not a very powerful argument.

11 MR. WAXMAN: Well, I -- I think it's a  
12 powerful argument. Let me explain the ones that I know  
13 of. 1978, the commission's decision in WGBH, which  
14 complained about scenes of explicit nudity in "Monty  
15 Python's Flying Circus": Denied. "Catch-22,"  
16 40 seconds of nudity, including 10 seconds of full  
17 frontal female nudity: Denied.

18 The four or five decisions that we cite --  
19 that we discuss on page 18 of our brief, and that are  
20 appended to the merits brief of the ABC affiliates -- I  
21 can't remember whether it's 12 or 16, but more than a  
22 dozen episodes of "NYPD Blue" itself that included  
23 displays -- graphic displays of nudity during the prior  
24 nine seasons. Complained about and not adjudicated.

25 That is the backdrop against which --

1 JUSTICE BREYER: But I --

2 CHIEF JUSTICE ROBERTS: That's what you've  
3 got --

4 JUSTICE BREYER: -- looked and found 17. I  
5 looked and -- I'm sorry.

6 CHIEF JUSTICE ROBERTS: That's what you've  
7 got over 85 years.

8 MR. WAXMAN: Well, first of all, we don't  
9 have television broadcasts over 85 years, and since  
10 there were no reported decisions of any indecency  
11 enforcement until Pacifica, I think it's only fair, as  
12 you pointed out yourself, to look at what the commission  
13 has been addressing.

14 They're right now -- I mean, you know, I've  
15 cited the ones that are the subject of commission  
16 decisions. I haven't cited the ones -- I haven't  
17 attempted to hypothesize about all the other instances,  
18 but let's just look at what's at stake here. Because  
19 the issue, Justice Breyer, is not just notice to ABC in  
20 this case, the question is whether the standards -- the  
21 commission's standards as it's currently applying them  
22 are so vague and capacious that they not only permit  
23 arbitrary action, but they are engaging in arbitrary  
24 action.

25 Right now, as -- as Mr. Phillips suggested,

1 the commission has pending before it, which it has not  
2 denied for years, complaints about the opening episode  
3 of the last Olympics, which included a statue very much  
4 like some of the statues that are here in this  
5 courtroom, that had bare breasts and buttocks.

6 It -- it has refused to say that  
7 "Catch-22" -- it's "Catch-22" -- right over here,  
8 Justice Scalia.

9 (Laughter.)

10 MR. WAXMAN: Well, there's a bare buttock  
11 there, and there's a bare buttock here. And there may  
12 be more that I hadn't seen. But frankly, I had never  
13 focused on it before. But the point --

14 JUSTICE SCALIA: Me neither.

15 (Laughter.)

16 MR. WAXMAN: Could -- could ABC or anybody  
17 else rebroadcast the "Roots" series? Could it  
18 rebroadcast "Catch-22," which the commission is now here  
19 saying, oh, no, no, no, that was just our staff, that  
20 wasn't us. In the "Saving Private Ryan" context, where  
21 the commission did say as a commission: Not actionably  
22 indecent.

23 JUSTICE BREYER: But your only conclusion  
24 from that is that they can't have any rule.

25 MR. WAXMAN: No.

1 JUSTICE BREYER: What is -- I looked through  
2 the briefs; I don't see what you're -- tell me where in  
3 these briefs do you suggest what the rule ought to be.

4 MR. WAXMAN: In our brief, we don't suggest  
5 what the rule ought to be, because A, it's not our  
6 burden; B, it's not yours; and C, there are any number  
7 of options.

8 JUSTICE KENNEDY: Well, we -- well, we have  
9 to anticipate what the natural results or consequences  
10 of our decision will be.

11 MR. WAXMAN: Sure.

12 JUSTICE KENNEDY: As I understand it, the  
13 same rules that we apply to obscenity for printed  
14 material under your view would apply to television.

15 MR. WAXMAN: Well, those rules certainly  
16 would apply. And before I --

17 JUSTICE KENNEDY: In other words, if it's --  
18 if it's not obscene, you can publish it. Period.

19 MR. WAXMAN: No, no, no. I'm not suggesting  
20 that the indecency proscription in the statute cannot be  
21 applied in a constitutional way. I can give you four  
22 different --

23 JUSTICE KENNEDY: Well, I thought that was  
24 the whole gravamen of your argument.

25 MR. WAXMAN: No. Our -- our arbitrariness

1 argument is that we now have a standard that employs  
2 nonexclusive factors that use capacious, vague words  
3 that can be balanced any way the commission wants to  
4 without explanation for what all the factors are.

5 JUSTICE ALITO: But isn't that inherent in a  
6 context-based approach? Unless you have an approach  
7 that says there are certain body parts you can never  
8 show, then aren't you going to get into -- isn't someone  
9 going to be able to come up and say you have this  
10 broadcast and you said that's okay, and this one, you  
11 said is not okay?

12 MR. WAXMAN: It certainly is not. And I can  
13 offer the Court or perhaps the commission four  
14 approaches it could take to reduce the astonishing  
15 vagueness of the current --

16 JUSTICE BREYER: Are they in the briefs?  
17 Can you just cite the pages where I will find the  
18 alternatives to the present system that don't jump  
19 obscenity alone.

20 MR. WAXMAN: I don't know the pages. Let me  
21 just -- I can't remember the pages. Let me just outline  
22 what I think four different things that could ameliorate  
23 the vagueness of the current regime.

24 First of all, the FCC could revert back to  
25 it's quote "emphatically narrow enforcement regime,"



1 which acknowledged one, that it had to defer to  
2 reasonable judgments of the broadcasters, and not  
3 exercise the -- an editorial eye looking at camera  
4 angles, whether something was or wasn't necessary to the  
5 message. Number 2 --

6 CHIEF JUSTICE ROBERTS: I -- I'm going to  
7 let you get all four out. But on that, the reasonable  
8 deference to the broadcasters, your policy was not to  
9 allow people in the situation of Paris Hilton and Nicole  
10 Richie to use those words. So if they deferred to your  
11 reasonable judgment, your friend's reasonable judgment,  
12 they would sanction those.

13 MR. WAXMAN: I am not owning Nicole Richie,  
14 and I think the best answer to the Nicole Richie point  
15 is that there is a scienter requirement in the statute  
16 that, you know, would preclude the application to a  
17 good-faith effort. But let me just --

18 CHIEF JUSTICE ROBERTS: Okay. Go on to  
19 number 2.

20 MR. WAXMAN: I'll just go back. Well, no.  
21 There are three parts to number 1. I'm not being --

22 (Laughter.)

23 CHIEF JUSTICE ROBERTS: Your time's -- I  
24 think you are.

25 Your time is about to expire. If you want

1 to get your four points out, you'd better move.

2 MR. WAXMAN: Okay. The first one is to  
3 revert back to the prior enforcement regime that existed  
4 before 2004, which deferred to reasonable judgments, was  
5 restricted to material that is not momentary exposure  
6 but is dwelled upon. And that as Pacifica explained,  
7 was egregious material akin to depictions of erotic  
8 activity.

9 The second thing they could do is make this  
10 three-factor test -- or however many factors it is -- a  
11 test, not just a nonexclusive list of an infinite number  
12 of factors that could or couldn't be balanced in any way  
13 the commission wants to. Even if it wants to leave it  
14 as factors -- and this is number 3 -- it could at least  
15 identify what they are, and apply them consistency --  
16 consistently through adjudication that explains why one  
17 over-balances the other, which it certainly did not do  
18 in this case.

19 And it also could clean up the actual form  
20 of the words that it uses, referring, for example, to  
21 sexually explicit or excretory activities.

22 Thank you, Mr. Chief Justice.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 General Verrilli, you have 4 minutes  
25 remaining.

1           REBUTTAL ARGUMENT OF DONALD B. VERRILLI, JR.,  
2                           ON BEHALF OF THE PETITIONERS

3           GENERAL VERRILLI: Thank you,  
4 Mr. Chief Justice.

5                           First with respect to the notion of self  
6 restraint on the part of broadcasters, I think a little  
7 history is in order here. The commission started with  
8 the rule that came out of Pacifica. What it faced in  
9 the 1980's, with that being the outer bound of the  
10 commission's authority, was the explosion of the shock  
11 jock phenomenon, Howard Stern and Bubba the Love Sponge  
12 and the rest of it which didn't use any of the seven  
13 words in the Carlin monologue, but which was highly vile  
14 and lewd, and it required the commission to make a  
15 judgment. Now, that was all advertising sponsored  
16 broadcast. And so I do think the risk of the race to  
17 the bottom is real, and I think history is showing it.

18                           JUSTICE KAGAN: General, I think that the,  
19 the networks really are saying: Well, even if some  
20 regulation is permissible, the kind of regulation that  
21 the FCC has done here is regulation that gives it  
22 complete discretion as to what kind of speech to go  
23 after and what not to go after; that it has not tied  
24 itself in any way to any kinds of standards. And, it's,  
25 you know, evident in the notion that this -- the way

1 that this policy seems to work, it's like nobody can use  
2 dirty words or nudity except for Steven Spielberg and  
3 that there's a lot of room here for FCC enforcement on  
4 the basis of what speech they think is kind of nice and  
5 proper and good. And so that's a serious First  
6 Amendment issue.

7           GENERAL VERRILLI: I -- Well, I disagree.  
8 First, that's the lens problem again. We are talking  
9 about a tiny, tiny number of the broadcasts that occur  
10 in a month, much less a year, much less a decade. So  
11 the idea that there's a significant First Amendment  
12 problem that encompasses a wide variety of broadcast  
13 expression, I just don't think comports with the facts.

14           Second, I do think if one looks at the  
15 corpus of decisions that the commission has made about  
16 what is indecent and what isn't, I think one can see  
17 with respect to the large majority of them, the vast  
18 majority of them that it is clear which side of the line  
19 something fell on. Yes, there is isn't perfect clarity,  
20 there are going to be some hard cases, but they really  
21 have identified where is, in the great scheme of things,  
22 a trivial number of hard cases.

23           I don't think one can say that this is a  
24 situation like in Reno which there is effectively no  
25 standard at all. In Reno, this Court distinguished the

1 Pacifica situation eight ways to Sunday, and I think  
2 we've identified them in our brief and those are valid.  
3 I do think there is a significant problem with thinking  
4 about Pacifica as the outer bound of the commission's  
5 authority under the First Amendment in addition to the  
6 shock jock problem. Of course --

7 JUSTICE GINSBURG: Even though the Justices  
8 involved said this is a narrow decision, both Justice  
9 Stevens and Justice Powell.

10 GENERAL VERRILLI: Yes, and, Justice  
11 Ginsburg, that is true and the principles the commission  
12 continues to apply are narrow principles. This is  
13 not -- this is not something that covers a vast array of  
14 speech on broadcast. It's a tiny fraction. And so --  
15 And I do think if you are talking about Pacifica as the  
16 outer bound, the consequences of the shock jocks are  
17 fine; the Super Bowl half time episode with Janet  
18 Jackson is fine.

19 You can have as many of these seven second  
20 episodes of "NYPD Blue" as you want. That's all fine.  
21 In fact, anything that isn't at that extreme level--

22 JUSTICE GINSBURG: But on the other side,  
23 you'd better be careful about calling certain people,  
24 certain artists to be interviewed because we know it's  
25 unscripted. They are going to risk that they are going

1 to say something they shouldn't say.

2 GENERAL VERRILLI: But I -- A couple answers  
3 there. One is the delaying bleeping technology, Justice  
4 Ginsburg, and the other one is that there is a scienter  
5 requirement under the commission's enforcement authority  
6 here. And so in that situation, it seems highly  
7 unlikely you had would have the requisite scienter that  
8 could lead to a forfeiture.

9 JUSTICE SCALIA: Maybe the third is you  
10 shouldn't interview these people.

11 GENERAL VERRILLI: Let me spend, if I could,  
12 a minute on the "NYPD Blue" broadcast. The -- ABC  
13 hinges a lot on the notion, Justice Breyer, that this is  
14 a non-sexualized episode. I mean, I guess one could  
15 make up ones own mind looking at the video. The  
16 commission decided that that was -- it was essentially  
17 voyeurism. The --

18 CHIEF JUSTICE ROBERTS: Finish your  
19 sentence, please.

20 GENERAL VERRILLI: Thank you. The little  
21 boy walks into the room at the very end of that -- of  
22 that segment of nudity, and I do think that fully  
23 vindicates the commission's judgment with respect to the  
24 nature of that broadcast.

25 CHIEF JUSTICE ROBERTS: Thank you, General.

1 Counsel, the case is submitted.

2 (Whereupon, at 12:23 p.m., the case in the  
3 above-entitled matter was submitted.)

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<b>A</b>	<p><b>actual</b> 50:19  <b>added</b> 34:4  <b>addition</b> 53:5  <b>addressed</b> 43:4  <b>addressing</b> 45:13  <b>adjudicated</b> 9:11              44:24  <b>adjudicating</b>              41:17  <b>adjudication</b>              50:16  <b>adopt</b> 31:24  <b>adult</b> 35:22 39:2  <b>advertisers</b> 29:1  <b>advertising</b> 36:1              36:21 51:15  <b>affiliates</b> 44:20  <b>affixed</b> 20:22  <b>agency</b> 8:5 13:15  <b>ago</b> 22:25  <b>agree</b> 11:16              13:17 22:4  <b>ahead</b> 34:24  <b>aimed</b> 28:6  <b>airwaves</b> 21:3,25  <b>akin</b> 50:7  <b>al</b> 1:4,8,21,23 2:8              2:12 23:17 38:3  <b>ALITO</b> 20:25              26:12,15,18              28:17 29:5 32:4              32:9,11,20 33:2              48:5  <b>allow</b> 31:20 49:9  <b>allowed</b> 15:12,13  <b>allows</b> 19:22              33:12 40:12  <b>all-important</b>              39:13  <b>alternative</b> 9:18              10:8  <b>Alternatively</b>              11:14  <b>alternatives</b>              48:18</p>	<p><b>ameliorate</b> 48:22  <b>Amendment</b> 7:22              8:17 10:4,10              25:20,21 26:20              27:18,19,22              28:15,18 31:2,6              33:6,7,12 37:13              42:12 43:2,2,13              52:6,11 53:5  <b>American</b> 20:9  <b>amount</b> 15:7 36:2  <b>analysis</b> 8:17              11:15 12:9              15:22  <b>analyze</b> 37:13  <b>analyzed</b> 37:16  <b>angles</b> 49:4  <b>answer</b> 7:16              18:16 25:17              49:14  <b>answered</b> 8:18  <b>answers</b> 27:16              54:2  <b>anticipate</b> 47:9  <b>anybody</b> 46:16  <b>anymore</b> 25:14  <b>anyway</b> 30:7  <b>apparent</b> 18:2,8              35:17  <b>appealed</b> 11:24  <b>appeals</b> 11:14              13:13  <b>appearance</b> 8:9  <b>APPEARANC...</b>              1:16  <b>appeared</b> 24:11              24:12  <b>appended</b> 44:20  <b>appendix</b> 11:21              14:23  <b>application</b> 14:20              42:13 43:10,17              49:16  <b>applications</b>              10:24 15:6</p>	<p><b>applied</b> 4:19 11:8              11:13,22 12:9              14:2,5 35:2              47:21  <b>applies</b> 32:1  <b>apply</b> 43:6,8              47:13,14,16              50:15 53:12  <b>applying</b> 13:9              45:21  <b>approach</b> 10:1              17:14 26:1 36:9              36:20 48:6,6  <b>approached</b>              11:19  <b>approaches</b>              48:14  <b>appropriate</b> 4:6              4:7,8,11 23:4,9  <b>arbitrariness</b>              8:10 9:7 47:25  <b>arbitrary</b> 8:18              13:22 45:23,23  <b>area</b> 15:8  <b>argue</b> 3:21 20:1              29:16,17  <b>argued</b> 12:12              36:12 42:17              43:3  <b>arguing</b> 6:6 7:1,4              7:5 33:17 41:4  <b>argument</b> 1:14              2:2,5,9,13 3:4,7              4:15 5:2,6,9              6:10,13,17,20              6:22,23 7:12              14:16 23:15              28:1 30:11,17              30:18,19,22              31:15,17,19              38:1 39:9 41:4              42:20 43:10,12              44:10,12 47:24              48:1 51:1  <b>arguments</b> 4:23</p>	<p>5:11 11:11              12:14,14,24              13:4,6  <b>array</b> 53:13  <b>artists</b> 53:24  <b>aside</b> 10:22  <b>asked</b> 25:18  <b>asking</b> 20:2 27:9              27:10 33:2  <b>aspire</b> 18:10  <b>assessed</b> 13:11  <b>assume</b> 9:19  <b>astonishing</b>              48:14  <b>attack</b> 10:18              12:20  <b>attempted</b> 45:17  <b>attend</b> 21:22,23  <b>attention</b> 41:22  <b>attract</b> 37:8  <b>audience</b> 3:25              36:22 37:1,5,6              37:10  <b>audiences</b> 29:2  <b>authority</b> 51:10              53:5 54:5  <b>automatically</b>              21:17  <b>available</b> 6:14              18:20 19:2 28:9              30:14  <b>average</b> 35:11  <b>awakening</b> 39:22              39:22 40:24              41:10  <b>awards</b> 20:20              34:23  <b>a.m</b> 1:15 3:2,18              9:22,23 16:3              28:19,24</p>
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